

Contrary to the district court's finding, the supreme court found a substantial impairment of contract because "the Venture's contractual relationship with the State was nonetheless based on the assumption, held by all parties, that the cyanide heap method would be used." Pet. App. 25a, ¶ 45. However, citing the Montana Constitution's guarantee of "the right to a clean and healthful environment," Mont. Const. Art. II, § 3, the court concluded that I-137 "is based on the significant and legitimate public purpose of protecting the environment." Pet. App. 26a, ¶ 46. The court also held I-137 to be reasonably related to that purpose "[i]n consideration of the acknowledged risks associated with the use of cyanide heap leaching, and the expressed concerns about the inadequacy of existing laws." Pet. App. 28a, ¶ 50. Although petitioners urged the court to apply heightened scrutiny to I-137 based on their assertion that it benefited the State's self-interest, the court refused because Montana's financial contractual interests were actually diminished by I-137, as it "caused the State to forego the opportunity to receive royalty payments estimated at \$5 million annually over the production life of the mining operation, which was expected to be twelve years." Pet. App. 27a, ¶ 47.

ARGUMENT

The decision of the Montana Supreme Court is a sound application of this Court's Contracts Clause and Takings Clause analysis to contract and property rights rooted in Montana law. As such, the decision does not conflict with any decision of this Court, any court of appeals, or any other state court of last resort. Further review is not warranted.

1. Petitioners first ask this Court to “decide whether realty and leases, which provided an opportunity for mining permits, are ‘property’ protected from uncompensated takings.” Pet. 7. By their terms, the agreements at issue show that petitioners never had a vested right to mine using the cyanide heap-leach process.

a. As the principal case upon which petitioners rely explains, this Court’s takings jurisprudence “has traditionally been guided by the understandings of our citizens regarding the content of, and the State’s power over, the ‘bundle of rights’ that they acquire when they obtain title to property.” *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992). The dimensions of property interests “are defined by existing rules or understandings that stem from an independent source such as state law.” *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). There can be no compensable taking “if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with.” *Lucas*, 505 U.S. at 1027.

Petitioners acknowledge that the property at issue is neither land nor leases, but “an opportunity for mining permits” on the land under the leases. This Court has recognized that mineral estates are a “unique form of property” over which the government, “as owner of the underlying fee title to the public domain, maintains broad powers.” *United States v. Locke*, 471 U.S. 84, 104 (1985). Therefore, “[e]ven with respect to vested property rights, a legislature generally has the power to impose new regulatory constraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties.” *Id.* at 104.

Here, the "bundle of rights" at issue includes the Montana mining laws, mineral leases, and subsequent agreements pertaining to the regulatory process and the lease terms. Montana law prohibits mining without an operating permit, something petitioners failed to obtain. Mont. Code Ann. § 82-4-335(1). The mineral leases themselves recited the broad discretion enjoyed by the State of Montana to impose "reasonable requirements to prevent soil erosion, air and water pollution, and to prevent unacceptable impacts to" natural resources. All other material agreements conditioned any mining activity upon general compliance with environmental protection laws and regulations as well as specific regulatory approvals, including an EIS and an operating plan. As the Montana Supreme Court found in its "essentially ad hoc, factual inquiries" into the interests involved, *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978), not one of the agreements, regulations, or laws applicable to petitioners since the inception of their mineral leases guaranteed them a right to mine, let alone a right to mine using the single mining process banned by I-137. In light of these express limitations on petitioners' rights under the mineral leases, the passage of I-137 by the people of Montana "did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes." *Id.* at 125.

Petitioners' "opportunity for mining permits" also depended on their active pursuit of those permits, a pursuit the petitioners abandoned beginning in September 1998 (when the DNRC ended the tolling of the primary lease term), two months before the passage of I-137. "[T]his Court has never required the State to compensate

the owner for the consequences of his own neglect." *Texaco, Inc. v. Short*, 454 U.S. 516, 530 (1982) (holding lapse of mining interest "upon the failure of its owner to take reasonable actions imposed by law" is not a taking).

b. Petitioners allege the existence of a conflict both among federal appeals courts and between those courts and the Montana Supreme Court "regarding the constitutional standard governing landowner challenges to permit denials." Pet. App. 11. The purported circuit split involves the Montana Supreme Court's use of an analogy to substantive due process property interests it analyzed in *Kiely Constr. L.L.C. v. City of Red Lodge*, 2002 MT 241, 57 P.3d 836. Pet. App. 12a-13a, ¶ 26. According to petitioners, "[t]he cases cited in *Kiely* reveal conflicts among federal appeals courts," conflicts described in another substantive due process case, *George Washington Univ. v. District of Columbia*, 318 F.3d 203 (D.C. Cir.), cert. denied, 540 U.S. 824 (2003). Regardless of whether the question presented by *George Washington Univ.* may or may not newly merit review by this Court, however, neither *Kiely* nor a substantive due process claim is the subject of the instant petition.

The second conflict petitioners allege is between the Montana Supreme Court's decision and that of the Court of Appeals for the Federal Circuit in *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed. Cir. 1990). That case involved the federal government's subjection of plaintiff's completed mining plan, which met all then-existing regulatory requirements, to the arbitrary veto of an entirely separate (and never before officially involved) sovereign entity, the Navajo Tribe, for the sole purpose of "enabl[ing] the Tribe to exact additional money from a company with whom it had a valid contract." *Id.* at 1438.

Indeed, the Federal Circuit distinguished *United Nuclear* from two cases in which it found no taking because in those cases, as in this case, the government action formed part of the background of reasonable regulation to which all property rights are subject. *Id.* at 1437-38. The first involved a Presidential order barring the operation of nuclear reprocessing plants that threatened the proliferation of nuclear weapons. *Allied-General Nuclear Services v. United States*, 839 F.2d 1572 (Fed. Cir.), *cert. denied*, 488 U.S. 819 (1988). The second involved a federal law requiring a mine owner to spend large amounts of money to stabilize its uranium tailings. *Atlas Corp. v. United States*, 895 F.2d 745 (Fed. Cir.), *cert. denied*, 498 U.S. 811 (1990). These cases, like this case and unlike the pure financial exaction at issue in *United Nuclear*, rested upon an ancient takings principle:

The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health . . . or the safety of the public, is not – and, consistently with the existence and safety of organized society, cannot be – burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain.

Mugler v. Kansas, 123 U.S. 623, 669 (1887), *cited in Allied General*, 839 F.2d at 1576; *see also M & J Coal Co. v. United States*, 47 F.3d 1148 (Fed. Cir.), *cert. denied*, 516 U.S. 808 (1995) (holding that, despite state's grant of mining permit to plaintiff, federal government's subsequent restriction on mining was not a taking.) The Federal Circuit's decisions support, rather than conflict with, the Montana Supreme Court's decision.

c. Petitioners' final argument for review of its takings claims is a request for this Court to "police state courts that may have a fiscal incentive to protect state coffers at the expense of private property." Pet. 14. Even setting aside the Montana Supreme Court's finding that I-137 deprived state coffers of millions of dollars of royalty income, this argument amounts to little more than a request for this Court to reconsider its opinion last term in *San Remo Hotel, L.P. v. City & County of San Francisco*, 125 S. Ct. 2491 (2005). As the Court then observed, "[i]t is hardly a radical notion to recognize that, as a practical matter, a significant number of plaintiffs will necessarily litigate their federal takings claims in state courts." *Id.* at 2506. Particularly in the complex state administrative context of this case, "State courts are fully competent to adjudicate constitutional challenges to local land-use decisions. Indeed, state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations." *Id.* at 2507.

While petitioners may find that the federal district court will be unavailable to reconsider the federal claims decided by the Montana Supreme Court, the issues addressed and authorities relied upon show that the state court did, in fact, consider and decide petitioners' federal claims. Pet. App. 3a, ¶¶ 2-5. In any event, as petitioners concede, the federal district court already has granted them their desired federal forum to determine the preclusive effect of the Montana Supreme Court's decision under *San Remo Hotel*. Pet. 14 n.2. This Court need not intervene.

2. In seeking review of their Contracts Clause claim, petitioners invite this Court to expand the limited application of heightened scrutiny under the Contract Clause beyond financial contracts to include "all impairments by a state of its own contracts," even where, as here, the impairment works to the state's financial disadvantage. Pet. 15. Relying mainly on commentary with scant reference to the contracts and alleged impairment at issue, petitioners would abstract beyond its rationale the state financial self-interest rule of *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977). Neither *United States Trust* nor this Court's subsequent application of the Contracts Clause leads to petitioners' conclusion. Absent any asserted conflict among lower courts or between the Montana Supreme Court and this Court, petitioners' Contracts Clause claim does not merit review.

a. *United States Trust* involved New Jersey's and New York's direct impairment of a debt obligation, a "purely financial" contract "the Court has regularly held that the States are bound by." 431 U.S. at 24-25. Rather than according its usual deference to the legislature, the Court carefully scrutinized the impairment to determine whether it "was both reasonable and necessary to serve the admittedly important purposes claimed by the state" because "a State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors." *Id.* at 29. Deference to a state's justification of financial self-interest would be misplaced, for "[i]f a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." *Id.* at

26. But the rule applies only in cases of financial benefit to the state; impairment even of a financial obligation would fall outside the reasoning of *United States Trust* if the impaired provision protected nonpecuniary interests similar to those served by I-137: "the State's promise to continue operating the [financed] facility . . . surely could not validly be construed to bind the State never to close the facility for health or safety reasons." *Id.* at 25.

Based upon the record at summary judgment, the Montana Supreme Court found that "[t]he passage of I-137 caused the State to forego the opportunity to receive royalty payments estimated at \$5 million annually over the production life of mining operation which was expected to be twelve years." Pet. App. 27a, ¶ 47. Thus, the Court declined to apply the heightened financial self-interest standard of *United States Trust* because "though the State was a party to the contract, its interests as a contracting entity were actually diminished by I-137's passage." *Id.* Petitioners deride this finding as "simplistic" because "I-137 allowed it to regain – without paying any compensation – Petitioners' valuable and improved lease properties containing mineral deposits worth hundreds of millions of dollars." Pet. 18-19. Yet simply put, the mineral leases reverted to the State of Montana (by their terms) subject to the same regulations that petitioners claim rendered them valueless; whatever possible diminution in value the I-137 cyanide heap-leach process ban caused to the mineral estate, the public owner suffered the same as the private lessee. The fact that the State of Montana might have incurred losses to its own mineral wealth as a result of I-137, if true, would argue against heightened scrutiny, not for it. Petitioners therefore offer no plausible explanation of how I-137, a ballot measure enacted not by a legislature

to protect its appropriation capacity, but by the people themselves to protect their health and safety, serves the state of Montana's self-interest in such a way to subject it to heightened scrutiny under *United States Trust*.

b. A second important distinction between this case and those cases where a state's self-interest draws careful scrutiny is the general applicability of a police power exercise such as I-137, as opposed to the repeal of a specific financial covenant such as that involved in *United States Trust*. The ban on cyanide heap-leach processing "did not proscribe a rule limited in effect to contractual obligations or remedies, but instead imposed a generally applicable rule of conduct designed to advance a broad societal interest." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 191 (1983) (quotation and citation omitted). The severance tax pass-through prohibition at issue in *Exxon* did not contravene the Contracts Clause because its effect on existing contracts "was incidental to its main effect" of protecting consumers. *Id.* at 192. Similarly, the "substantial sums of money" petitioners claim to have lost, Pet. App. 69a, were not due them by the terms of any contract they held with the state of Montana, but, like any investment involving a regulated matter, were subject to the incidental effect of a generally applicable law. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 416 (1983) (rejecting Contracts Clause challenge to law where "the contracts expressly recognize the existence of extensive regulation by providing that any contractual terms are subject to relevant present and future state and federal law.>").

In addition to the "generally applicable rule" inquiry, "[t]he requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather

than providing a benefit to special interests." *Id.* at 412. The environmental protection measure enacted by I-137 serves more than a legitimate public purpose; it serves purpose of constitutional dimension under Montana's Constitutional guarantee of a "clean and healthful environment." Mont. Const. Art. IX, § 1(1); *Montana Environ. Info. Ctr. v. Department of Envir. Quality*, 1999 MT 248, ¶¶ 63-64, 988 P.2d 1236, 1246 (recognizing as fundamental the right to "clean and healthful environment," and imposing strict scrutiny to state action implicating that right).

c. Petitioners' moral and policy arguments to extend heightened scrutiny to all impairments of state contracts, Pet. 17-19, should fail. It is rather late in the day to read the terms of the Contracts Clause as imbued with absolute "notions of fairness" requiring that "*government must keep its word*," Pet. 17 (citing Laurence H. Tribe, *American Constitutional Law*, §§ 9-10 at 619 (2d ed. 1988)), its police power notwithstanding, or to insist that an "imperative that government accommodate private expectations by acting only pursuant to rules fixed and announced beforehand," Pet. 18 (citing Note, *Rediscovering the Contract Clause*, 97 Harv. L. Rev. 1414, 1427 (1984)), overrides the expressed health and safety demands of its citizens. This Court long ago determined that the Contracts Clause "is not to be read with literal exactness like a mathematical formula." *Home Bldg. & Loan Assoc. v. Blaisdell*, 290 U.S. 398, 428 (1934). "Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." *Id.* at 435.

In this light, and contrary to petitioners' complaint that "it will often be difficult to identify whether the State is acting in whole or in part to further its financial interests distinct from some other form of self-interest," Pet. 18, any rule beyond the financial self-interest rule of *United States Trust* would prove unworkable: by definition, anything within a state's police power "authority to safeguard the vital interests of its people," *Blaisdell*, 290 U.S. at 434, could be considered "some other form of self-interest." Petitioners offer no principled limit to their proposed rule invalidating the application of any law that impairs any contract with the state regardless of financial benefit, for there is none. Instead, attempted enforcement of such a sweeping and unwarranted intrusion into state action would soon evince the wisdom of Justice Holmes in his observation that "[o]ne whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908).

CONCLUSION

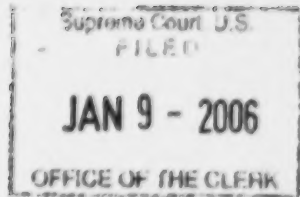
The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 05-588



IN THE
Supreme Court of the United States

SEVEN UP PETE VENTURE, *ET AL.*,

Petitioners,

v.

THE STATE OF MONTANA, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Montana

**BRIEF IN OPPOSITION OF RESPONDENTS
MONTANA ENVIRONMENTAL INFORMATION
CENTER, MONTANANS FOR COMMON SENSE
MINING LAWS-FOR-I-137, BIG BLACKFOOT
CHAPTER OF TROUT UNLIMITED, AND MINERAL
POLICY CENTER**

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QUESTION PRESENTED

Whether this Court should review the Montana Supreme Court's rejection of petitioners' fact-bound claims that a prohibition on environmentally destructive mining techniques constituted a taking or a Contract Clause violation under Montana law.

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INTRODUCTION

Petitioners in this case seek review of the Montana Supreme Court's rejection of their state-law challenges to the loss of state mineral leases on which they hoped to conduct environmentally destructive cyanide heap-leach gold mining on the banks of a pristine trout stream. Although petitioners contend that the Montana Supreme Court decided federal takings and Contract Clause questions in the course of deciding their strictly state-law claims, they fail to mention that the Montana Supreme Court also affirmed the termination of their mineral leases on the purely state-law ground that a state agency had correctly determined that they had violated a term of the leases by failing to take active steps to pursue the permitting process over a seventeen-month period. That purely state-law ruling constitutes an independent and adequate state-law ground for the judgment below.

In any event, petitioners' takings and Contract Clause claims do not warrant review. Even assuming that the state court decided a federal takings claim, petitioners' principal criticism of the state court is that it analyzed their takings claim in the way they asked it to (as a claim that they had been deprived of the *opportunity* to apply for a permit). Petitioners' additional assertion that the Montana court's takings analysis presents a conflict with federal appellate decisions is groundless, amounting to little more than a claim that the Montana court cited a decision that cited other decisions that reflected different approaches to an issue not presented here.

As for petitioners' Contract Clause claim, the Montana court decided only a state Contract Clause claim over which this Court has no jurisdiction. In any event, petitioners' argument that the court should have applied heightened scrutiny even though the alleged contractual impairment did not advance the state's pecuniary interest is contrary to this Court's decision in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), and is not supported by any judicial authority. Petitioners concede that the only other decisions they

know of that address the issue *support* the Montana court's approach. Under such circumstances, there would be no reason to review the Montana court's analysis even if it concerned a federal Contract Clause issue.

STATEMENT

In November 1998, Montana voters enacted Initiative 137 (I-137) to ban new cyanide heap-leach mines. Cyanide heap-leach mining is a relatively recent invention. Mine operators pour a cyanide solution over tremendous piles of low-grade ore extracted from open-pit mines, leaching minuscule amounts of gold and silver from each ton of ore. The inevitable by-products are residual cyanide and huge quantities of waste rock, which are prone to further leaching of acidic compounds from exposure to air and precipitation. Waste water from heap-leach piles produces acid mine drainage that can persist for decades, degrading surface and subsurface waters. All parties agree that cyanide heap-leach mines can cause serious environmental damage.

Bankrupt open-pit cyanide heap-leach mines have caused serious environmental problems in Montana. *See, e.g.,* 67 Fed. Reg. 7191 (Feb. 15, 2002) (final environmental impact statement addressing reclamation/treatment alternatives for acid mine drainage at Zortman mine). *See also Gros Ventre Tribe v. United States*, 2004 Lexis 26865 (D. Mont. June 29, 2004) ("It is undisputed that the Zortman-Landusky mines have devastated portions of the Little Rockies, and will have effects on the surrounding area, including the Fort Belknap Reservation, for generations. That devastation, and the resulting impact on tribal culture, cannot be overstated."). Montana taxpayers have been left to bear the cost of reclaiming and treating abandoned cyanide heap-leach mines. *See* 67 Fed. Reg. 7191 (discussing the preferred reclamation alternative at Zortman, which exceeded bonding by \$22.5 million, and noting the need for an additional \$11 million for permanent water treatment regardless of the alternative selected).

Twelve years before I-137, Montana issued mining leases on several sections of state land to Western Energy Company. The properties, which contained large quantities of low-grade gold and silver ore, were close to the Blackfoot River, the stunning trout stream immortalized in Norman Maclean's *A River Runs Through It*. Petitioner Seven-Up Pete Joint Venture (the Venture) purchased the leases from Western Energy, and, along with several other of the petitioners, acquired additional private mineral leases on adjacent land and began planning a massive cyanide heap-leach mine on the banks of the Blackfoot.

The leases themselves granted the Venture no right to mine on state lands; Montana law required the operator to obtain a Metal Mine Reclamation Act operating permit, as well as all other permits required by state and federal agencies. Mont. Code Ann. § 82-4-335(1). Montana retained full authority to require the Venture to provide reclamation plans, environmental studies and other permits, to reject any part of the Venture's application as inadequate, and to deny an operating permit. See Mont. Admin. R. 17.24.404. Moreover, Paragraph 7 of the leases specifically stated that the lessee "shall fully comply with all applicable state and federal laws, rules and regulations, including but not limited to those concerning safety, environmental protection and reclamation."

In 1993, the Venture formally proposed its cyanide heap-leach mine adjacent to the Blackfoot, where it hoped to extract up to 9 million ounces of gold and 20 million ounces of silver on a portion of the leases known as the McDonald Project. Because of the necessity of completing an environmental impact statement (EIS) and the then-imminent expiration of the ten-year lease terms, Montana and the Venture entered into an amendment to the leases that tolled the remaining seventeen months of their terms, on the express condition that the Venture would actively pursue an operating permit. All other lease terms, including Paragraph 7, remained in full force and effect.

Aware of the environmental damage and taxpayer liability occasioned by the Zortman cyanide heap-leach mine and other failed cyanide mines in Montana, the respondent organizations that join in this brief formed a ballot-initiative committee, began a state-wide campaign to ban future open-pit cyanide heap-leach mining, and obtained the requisite signatures to put I-137 on the November 1998 ballot.¹ On July 2, 1998, while the campaign for I-137 was in full swing, the Montana Department of Environmental Quality (DEQ) issued a stop-work order on the McDonald Project EIS because of the Venture's failure to pay fees for third-party EIS services. The Venture missed later payments as well, and Montana notified the Venture in September 1998 that, because of the stop-work order on the EIS, the lease extensions granted to the Venture in 1993 were suspended, and the remaining unexpired primary lease term of seventeen months would begin to run for each of the mineral leases. Montana informed the Venture that the mineral leases would therefore terminate on their own accord on February 23, 2000, unless the Venture reactivated the permitting process.

I-137 was passed by a majority of Montana voters and became effective on November 3, 1998. The Venture did not possess an operating permit for a cyanide heap-leach mine when I-137 became law, but it still held its leases, which were actively running. The Venture, however, failed to complete the EIS and did not actively pursue completion of the operating permit application process. On February 24, 2000, Montana informed the Venture that its mineral leases for the McDonald Project had expired because of its failure to complete the application process, commence mining, return any royalties to the state, or otherwise comply with lease terms.

¹ As intervenors in the courts below (see Pet. ii), the organizations are respondents in this Court under S. Ct. R. 12.6.

The Venture administratively appealed the termination of the leases, and on October 26, 2000, the Director of Montana's Department of Natural Resources and Conservation (DNRC) rejected the appeal on the ground that petitioners had done nothing to pursue the permitting process during the seventeen months between September 1998, when they were notified that the remaining terms of the leases would resume running, and February 2000, when the leases terminated.

Meanwhile, in April 2000, petitioners initiated this lawsuit in Montana state court, asserting a laundry list of state-law challenges to the cyanide heap-leach mining ban. Petitioners specifically refrained from presenting federal constitutional challenges in the state-court action, reserving them for a federal lawsuit that was filed simultaneously with the state case and stayed to allow exhaustion of state-law issues. After the final DNRC ruling upholding the termination of the mineral leases, petitioners expanded the state-law action to include a request for judicial review of that ruling as well.

When the trial court rejected all their state-law claims, petitioners appealed to the Supreme Court of Montana. The appeal presented only petitioners' (state) constitutional takings and impairment-of-contracts claims, as well as the claim that the trial court had erred in upholding the DNRC's lease termination decision. Petitioners' takings claim centered on the alleged taking of rights conferred by the state mineral leases (*see* Appellants' Initial Br. 11-30; Appellants' Reply Br. 3-13).² Specifically, petitioners contended that the leases gave them a property interest in "the *opportunity* for a favorable ruling on [the Venture's] application to conduct [cyanide heap-leach] mining," which they claimed had been taken by the state. Appellants' Reply Br. 3. Petitioners' only claim with respect to the alleged taking of property interests other

² Petitioners' briefs in the Montana Supreme Court are available online at www.lawlibrary.state.mt.us/dscgi/ds.py/View/Collection-11541 (last visited January 4, 2006).

than the state mineral leases (i.e., private mineral leases or fee ownership of land and minerals) was their briefly stated contention that a remand was required under state law because the trial court had completely failed to articulate a reason for rejecting claims based on such property interests. *See* Appellants' Initial Br. 42-43; Appellants' Reply Br. 18-19.

The Montana Supreme Court rejected the takings and impairment-of-contract claims as well as the challenge to the DNRC's termination of the leases. *Seven Up Pete Venture v. State*, 114 P.3d 1009 (Mt. 2005). With respect to the takings claim, the court held that the interest petitioners claimed was taken—the opportunity to obtain a permit that they contended the mineral leases embodied—did not rise to the level of a constitutionally protected property interest because of the state's extremely broad discretion (entirely apart from the newly enacted ban on cyanide heap-leach mining) to deny or condition a permit. *Id.* at 1018-19. As for petitioners' fall-back claim that the case should be remanded because the trial court had not articulated a reason for rejecting takings claims based on interests other than the state mineral leases, the court pointed out that the district court had indeed stated reasons for its decision in that respect. Because the petitioners' only claim was that the court had failed altogether to state reasons, the court did not evaluate any claims with respect to the correctness of the reasons stated. *Id.* at 1020.

The court went on to reject the contract-impairment claim on the ground that the mining ban was "reasonably related to the legitimate and significant purpose of protecting the environment." *Id.* at 1025. The court declined to apply a "heightened level of scrutiny" in evaluating the reasonableness of the ban because any impairment of the mineral leases was actually contrary to the state's pecuniary self-interest as a party to the contracts. *Id.* at 1023.

Finally, the court held that the DNRC had properly terminated the state mineral leases because petitioners had failed to take active steps to pursue the permitting process (a

failure that began *before* the passage of the cyanide heap-leach mining ban). *Id.* at 1025-27. Applying principles of Montana law, the court found that the DNRC's decision was not clearly erroneous because it was supported by substantial evidence in the record. The court canvassed a number of steps petitioners could have taken (notwithstanding the passage of the ban) to pursue the permit process, and it noted that petitioners themselves conceded that they "had to do 'something' to pursue issuance of the permits." *Id.* at 1026. The court concluded that petitioners' filing of a challenge to the ban (*after* the leases had already terminated) while doing nothing else to advance the permitting process was not enough. *Id.* Thus, for reasons that in no way rested on either the passage of the mining ban or its constitutionality, the court upheld the state's termination of the mineral leases.

REASONS FOR DENYING THE WRIT

I. The Montana Supreme Court's Takings and Contract Clause Rulings Are Not Outcome Determinative.

Even while asserting their takings and Contract Clause claims concerning initiative I-137, petitioners nowhere address the actual basis on which their leases were terminated: the Montana DNRC's determination that they had failed actively to take available steps to pursue the permitting process. The Supreme Court of Montana affirmed the agency's determination, holding that:

[I]t is clear that the Venture was not limited to simply bringing a legal challenge to I-137 while doing nothing before the agency. We cannot conclude, therefore, that the DNRC and District Court's conclusion of law that the Venture failed to actively pursue the permitting process before the agency was erroneous.

114 P.3d at 1027.

The Montana Supreme Court's ruling in this respect was based entirely on its analysis of the administrative record and